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WESLEY MAYDER

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VERIGY US, INC., a Delaware Corporation,

Plaintiff,

v.

ROMI MAYDER, an individual; WESLEY
MAYDER, an individual; SILICON TEST
SYSTEMS, INC., a California Corporation;
and SILICON TEST SOLUTIONS, LLC, a
California Limited Liability Corporation,
inclusive,

Defendants.

AND RELATED CROSSCLAIMS.

Case No. 5:07-cv-04330-RMW (HRL)

**DEFENDANT WESLEY MAYDER'S
REPLY TO PLAINTIFF'S OPPOSITION
TO DEFENDANT'S MOTION FOR RULE
11 SANCTIONS**

Before: Judge Ronald Whyte
Ctrlm: 6
Date: September 5, 2008
Time: 9:00 a.m.

Complaint Filed: August 22, 2007
Trial Date: December 8, 2008 (jury trial)
(Defendants have elected to reserve their jury
trial rights under F.R.C.P., Rule 38)

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INTRODUCTION

Is suing a shareholder reasonable? Is suing a shareholder without doing any prior proper investigation—and without even sending any form of notification or demand letter to the shareholder asking for answers to any questions before filing suit—reasonable and in compliance with the standards for professional conduct under Rule 11 of the Federal Rules of Civil Procedure? The answer to all these questions is a resounding “No:” our federal courts do not exist to permit public companies (or any other plaintiffs) to simply add shareholders as defendants to major federal litigation in a “ready, fire, aim” and overall “shotgun” approach and Rule 11 was designed to prevent precisely this. What the Court will NOT see in any of the voluminous paperwork filed by the attorneys for Verigy in this case is a single pre-filing memorandum, a single pre-filing legal research summary, or even a single pre-filing email which sets forth the underlying factual or legal basis for suing Wes Mayder. Why? Because there was no such memorandum, there was no such legal research, and there was no such pre-filing thought process other than to put pressure on Wesley Mayder for wrongful reasons.

Verigy’s papers in opposition to Wesley Mayder’s motions for summary judgment and rule 11 affirm that Verigy frivolously sued Wesley Mayder, without having done a proper investigation, and is continuing to sue him despite knowing that he is not liable in this action. Accordingly, Verigy’s opposition confirms that Verigy and its attorneys, Bergeson, LLP, should be held liable for Rule 11 sanctions for having brought a frivolous and unsupported lawsuit against Wesley Mayder, for having refused, despite multiple warnings by Mr. Mayder’s counsel, to dismiss this unsupported suit against Mr. Mayder, and for having renewed these factually and legally frivolous and bad faith claims against Wesley Mayder made before this Court as recently as June 2008.

ARGUMENT

I. VERIGY FAILS TO MEET THE OBJECTIVE STANDARD FOR RULE 11 CERTIFICATION OF CLAIMS PRESENTED AS TO WESLEY MAYDER.

By presenting to the Court, by signing, filing, submitting or advocating a pleading written motion or other paper, an attorney or unrepresented party certifies that to the best of its knowledge, and based upon a reasonable inquiry, that the paper is not presented for improper purpose, that its claims, defenses and legal contentions are warranted by existing law and that the factual

allegations or denials of factual allegations therein have evidentiary support, or are likely to after reasonable opportunity for investigation or discovery. Fed. R. Civ. Proc., rule 11 (b) (1-4). Sanctions are warranted if the papers presented are based upon “bad law” or “bad facts” or presented for improper purposes, such as harassment, to cause unnecessary delay or to needlessly increase the cost of litigation. *Id.*

Whether this standard is violated is tested **objectively** to determine whether the papers are frivolous, legally unreasonable or without factual foundation. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986). Here, Verigy’s so-called claims against Wesley Mayder, now revealed to be an *unpled* (and completely unsupportable) civil conspiracy claim, fail this objective test as to all three counts, and Verigy’s opposition makes this failure to meet the objective standard clear by failing to support its pre-existing allegations against Mr. Mayder and by attempting to put forth yet another unsupported and legally frivolous claim against Mr. Mayder. After having finally undertaken to actually investigate its claims, the so-called evidence brought forth by Verigy demonstrates that it had no objective basis in law or fact to sue him, and certainly has no basis to continue a suit against him. (Defendant Wes Mayder incorporates by reference and asks the Court to take judicial notice of the concurrently filed Evidentiary Objections and Wes Mayder’s submissions in the co-pending Rule 56 motion.)

II. **VERIGY CONCEDES THAT IT HAS NO EVIDENCE OF ANY INTENTIONAL WRONGDOING BY WESLEY MAYDER.**

Verigy’s opposition papers reveal that its entire basis for trying to hold Wesley Mayder liable is that he was a civil conspirator of his brother, Romi, and as such, is liable for any and all acts of his brother. Verigy’s Memorandum of Points and Authorities in Opposition to Wesley Mayder’s Motion for Summary Judgment (“Opp.”) at 3. Moreover, Verigy’s opposition reveals that it has no evidence against Wesley Mayder as to his knowingly or intentionally entering into some type of conspiracy against Verigy, but relies instead on his having allegedly been *negligent* in not discovering any alleged wrongdoing by his brother. Opp. at 7. Making an investment without doing more research or more diligence is far different from knowingly and intentionally entering into a conspiracy against a public company. There is no Rule 11 rule of professionalism for the degree of investigation one does in choosing to make an investment in his or her brother’s

company; but, there is a Rule 11 rule of professionalism that applies to all federal litigants and to all attorneys representing parties in Federal Court to investigate the facts and the law fully and to meet an objective standard of reasonableness for filing suit and for adding parties to that lawsuit. There was no such objectively adequate investigation in this case and the “after-the-fact” efforts by the Bergeson firm do not even come close to meeting Rule 11 standards and it is a further affront to this Court (and to Wes Mayder) that they still refuse to admit it.

A. Verigy’s Entire Argument That Wesley Mayder is Liable Is Based Upon a Claim for Conspiracy That Was Never Pled.

Verigy’s attempt to hold Wesley Mayder liable for conspiracy fails miserably given that Verigy has failed to even plead the facts required to pursue a conspiracy claim; moreover, Wesley Mayder had no duty to investigate the actions of his brother because he was neither an officer nor director of either STS LLC or STS, Inc., contrary to Verigy’s efforts to muddy the waters in that regard, and even had he been, he made the proper inquiry within the realm of his understanding to confirm that no wrongdoing had occurred, or at least to shield himself from vicarious liability.

Verigy spends absolutely no time in its brief defending any of the “causes of action”¹ in the complaint as against Wesley Mayder, or presenting evidence as to Wesley Mayder’s position in Silicon Test Systems, Inc., but instead, has attempted to now rely instead upon a claim of civil conspiracy, a claim it has *never properly pled in this action*.² Verigy alleges, “Wes Mayder was an active co-conspiratory in his brother’s activities, regardless of his formal position in the STS Entities.” Opp. at 4:22-23.

A claim for civil conspiracy requires that the pleader set forth allegations regarding all of the following elements:

¹ The entire Complaint appears to be a “cut and paste” of some prior state court pleading; this Court has the power to require that Verigy and its lawyers show cause how they arrived at adding Wes Mayder as an individual defendant in this case including what prior pleading was used as the “model” for choosing to simply “throw in” Wes Mayder (as an after -thought). If each draft of the original pleading were produced pursuant to the Court’s Show Cause Order, Defendants have no doubt whatsoever that Wes Mayder was added at the last minute and simply with the view of putting additional pressure on the Defendants in this case because the pleading itself barely recites even a single fact specifically as against defendant Wes Mayder.

² Indeed, in his opening brief to his concurrently filed Motion for Summary Judgment, Mr. Mayder alerted the Court to the fact that Verigy would attempt to manufacture an alter ego or conspiracy claim having never in fact pled such claims. See Docket No. 230 at 9.

- 1) someone was responsible for damage to plaintiff;
- 2) that someone and one or more other persons formed an agreement to commit a wrongful act, either orally, in writing or by course of conduct;
- 3) the other persons were aware that the first conspirator planned or carried out a wrongful act;
- 4) the others agreed with the first conspirator and agreed the wrongful act should be committed;
- 5) Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to impose vicarious liability on a so called co-conspirator.

CACI Section 3600.³

Verigy has not come close to pleading, or raising a material dispute as to these elements.

Where is the evidence that Wes and Romi Mayder made an agreement to commit a wrongful act?

Where is the evidence that Wes Mayder intended or wanted his brother to engage in a wrongful act?

Verigy has no such evidence, and instead relies upon the so-called “mere knowledge” imparted to

Wes Mayder by dint of his having received copies of Verigy’s counsels’ threatening letters. As

CACI Section 3600 confirms, such mere knowledge is insufficient to raise a claim of civil

conspiracy. Rather, Verigy continues to try to rely upon immaterial facts, such as Wes Mayder’s

having initially made an investment in STS LLC, but which investment was returned because the

company never got off the ground. Opp. at 5-6.⁴ Verigy hopes that passive investment, not active

conspiracy, is enough to tag Wes Mayder, but it is not.

Indeed, Verigy has conceded that it has no evidence of intentional wrongdoing by Wes

Mayder, or even knowledge by him of his brother Romi having committed any wrongful acts.

³ While CACI Section 3600 confirms that civil conspiracy is not a separate cause of action, that does not relieve Verigy from pleading and proving the factual elements required thereof. A pleading that fails to include sufficient detail of alleged wrongdoing to support a conspiracy charge cannot be the basis for legal liability, and here, Verigy’s Complaint is bereft of any such detail. *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F.Supp.2d 941, 950 (N.D. Cal. 2003).

⁴ Similarly, Verigy points to Wes Mayder’s having attempted to help with fundraising for STS, Inc. Opp. at 9. Nowhere does Verigy recite to any facts or case law, however, that supports its once-again conclusory allegation that “[f]undraising for a start-up company is not the domain of a merely passive investor.” *Id.* What case law has held that helping with fundraising creates tort liability for a person who otherwise knows of no wrongdoing and participates in no wrongdoing. Verigy cites to no such case, because there is none.

1 Instead, Verigy has now resorted to a position that Wes Mayder was *negligent* in not discovering
 2 the wrongdoing based upon the case of *PMC, Inc. v. Kadisha*, 78 Cal.App.4th 1368 (2000). Opp.
 3 at 8. But that case, too, fails to support Verigy's position. Rather, the court in *PMC* held that a
 4 *corporate officer or director* could be held liable in tort only if he: a) purchased or invested in the
 5 corporation, the principal assets of which were the result of unlawful conduct; b) the officer or
 6 director *took control of the corporation and appointed personnel to run the corporation* c) the
 7 officer or director did so with knowledge, or with reason to know, that unlawful conduct had
 8 occurred. *Id.* at 1372 (emphasis added).

9 Here, there is no competent evidence put forth by Verigy that Wes Mayder in any respect
 10 took control of the corporate entities, either STS LLC or STS, Inc., and the vast majority of evidence
 11 in fact informs the opposite. While he intended to originally invest in STS LLC, the company was
 12 never in fact consummated, his investment was returned and he took no action to make that company
 13 a going concern. *See* Declaration of Donald P. Gagliardi in Opposition to Wesley Mayder's Motion
 14 for Rule 11 Sanctions ("Gagliardi Decl."), at Ex. A, pp. 31:14-35:3. Verigy has put forth no
 15 evidence in opposition to dispute this testimony. Second, the evidence supports the conclusion that
 16 Wes Mayder was never an officer or director of either STS LLC or STS, Inc., but rather was simply
 17 an investor. He was asked repeatedly in deposition about emails sent by his brother Romi that
 18 appeared to mention him as a board member of STS, Inc., and he repeatedly informed Verigy that
 19 those were simply mistakes by Romi in mixing up a shareholder relationship with a board member
 20 relationship. *See* Declaration of Jack Russo ("Russo Decl."), submitted herewith, at Ex. A, at pp.
 21 126:11-131:6.

22 The other evidence before the Court supports the conclusion that Wes Mayder was never an
 23 officer or director of STS LLC or STS, Inc., and a few random, mistaken references by Romi Mayder
 24 does not change that. Rather, as Romi Mayder himself has sworn to under oath in papers filed with
 25 the Court on this motion, the papers filed with the California Secretary of State and other corporate
 26 documents belie any contention that Wes Mayder was an officer or director of either entity. *See*
 27 Supplemental Declaration of Romi Mayder in Support of Motion for Summary Judgment and Motion
 28

1 for Rule 11 Sanctions (“Suppl. Romi Mayder Decl.”), at ¶4, Exs. A-D thereto, Docket No. 259.⁵

2 Nonetheless, Verigy attempts to manufacture a finding of control or agreement to conspire
3 by Wes Mayder in pointing to an assortment of random issues or acts that in no way suggest
4 control. For example, Verigy points to Wes Mayder’s having taken down an STS website at his
5 brother’s request after his brother received threatening letters from Verigy’s counsel. But if a
6 shareholder providing minimal help to a corporation’s CEO, sole officer and sole director creates
7 liability then the whole concept of limited liability for shareholders is turned upside down and the
8 entire basis for investing in early stage companies in California will be frustrated in a manner
9 opposite from the law and policy that is well-settled in the California Corporations Code. See Cal.
10 Civil Code, section 14; *Erkenbrecher v. Grant*, 187 C. 7, 9 (Cal. 1921); *Hollywood Cleaning &*
11 *Pressing Co. v. Hollywood Laundry Service*, 217 C. 124, 129 (Cal. 1932).

12 There has to be a showing of control, and agreement to conspire, and Verigy has provided
13 neither. As neither an officer or director of the entities charged with wrongdoing, Verigy cannot
14 hold him liable for civil conspiracy. Nor has Verigy demonstrated any control or even a material
15 dispute involving control of either STS entity by Wes Mayder. See Declaration of Daniel E.
16 Hanley, submitted herewith, at ¶¶4-8.

17 Moreover, even were Verigy’s misreading of the *PMC* case correct, there is no showing of
18 negligence by Wes Mayder in connection with the corporations or Verigy’s alleged trade secrets.
19 As Wes Mayder testified, after he was provided copies of Verigy’s attorneys’ threatening letters to
20 his brother, he *repeatedly* inquired of his brother, Romi, whether there was any proper basis for
21 Verigy to have claimed Romi was misusing Verigy confidential information. Gagliardi Decl. at
22 Ex. A, at pp. 170:5-174:11.⁶ Wes Mayder did not “stick his head in the sand” as Verigy would
23

24 ⁵ Additionally, Romi Mayder confirmed that while he had attempted to get his brother to sign up
25 as an STS board member, he declined to do so. Suppl. Romi Mayder Decl. at ¶6-10.

26 ⁶ Verigy appears to take the position that a mere demand letter from an attorney provides
27 adequate evidence of wrongdoing that required that Wes Mayder, a non officer or director, do
28 something more than inquire repeatedly of wrongdoing. Wes Mayder has testified under oath
to the Court on this motion that he lacks understanding of the semiconductor business; he
testified in deposition as well that he could not really understand much of what was in the
Verigy threatening letters. Gagliardi Decl. at Exh. A, at p. 133:21-134:18.

1 have it; he made appropriate inquiry within the bounds of his understanding; further, given his
 2 mere investment role in the company, he had no duty to inquire further in any event.

3 //

4 **B. Even if Verigy Could Support its Conspiracy Theory Against**
 5 **Wes Mayder, it Has Failed to Provide Evidence to Demonstrate**
 6 **That There is a Material Dispute as to the Claims Against Him.**

7 Verigy has admitted by its opposition papers that it has no direct evidence of any
 8 intentional tort by Wes Mayder, and so is proceeding on the basis that he is liable for the alleged
 9 acts of his brother Romi. But that means that Verigy was required in its opposition to at a
 10 minimum demonstrate that there was material dispute of fact as to:

- 11 1) whether any trade secret misappropriation occurred; Verigy has provided
 12 no evidence of that in its opposition;
- 13 2) whether anyone had improper access to its computer or computer systems
 14 to support its Third, Fourth and Fifth "Causes of Action"; again, Verigy
 15 put on no evidence to demonstrate that anyone had such access;
- 16 3) the unfair competition claims, the alleged Sixth and Seventh "Causes of
 17 Action", require a showing of other wrongdoing by Wes Mayder or a co-
 18 conspirator, but no such showing is put on by Verigy;
- 19 4) the Ninth and Tenth "Causes of Action," for federal and state false
 20 advertising, require evidence that Wes Mayder or a co-conspirator actively
 21 marketed and advertised and in doing so made false statements to Verigy's
 22 detriment; no evidence has been brought forward on summary judgment to
 23 support these claims;
- 24 5) the Eleventh "Cause of Action", for alleged intentional interference with
 25 prospective economic advantage, requires a showing of knowledge of
 26 such economic advantage and intentional interference in the relationship;
 27 Verigy has provided no evidence that Wes Mayder was so aware, or that
 28 any other person was so aware, or interfered.

Verigy fails utterly to present any evidence which meets the objective standard for
 demonstrating a legal or factual basis as to each claim. Rather than do so, Verigy attempted to rely
 solely on an assertion of civil conspiracy but *without having adduced competent evidence of any*
underlying wrongdoing by another conspirator. That was Verigy's burden in order to show an
 objective basis for suing Wes Mayder but it completely failed to provide such evidence, such that
 it has failed to show that it had adequate grounds to sue him as a co-conspirator based on some

1 other person's acts.⁷ As set forth in CACI Section 3600, Verigy had to provide *evidence* to
 2 support such underlying wrongdoing, but completely failed to do so in its opposition papers.

3 **C. Verigy's "Investigation" and Legal Reasoning Do Not**
 4 **Meet the Standard of Reasonableness and Competency.**

5 Verigy's attorneys have submitted a conclusory declaration which supposedly supports
 6 Verigy's statements that its claim asserted against Wesley Mayder was based on an "inquiry
 7 reasonable under the circumstances," "not presented for any improper purpose," and
 8 "warranted...by existing law and...had evidentiary support or were likely to have evidentiary
 9 support after a reasonable opportunity for further investigation or discovery." *See*, Declaration of
 10 John Fowler in Opposition to Wesley Mayder's Motion for Rule 11 Sanctions ("Fowler Decl."),
 11 dated July 11, 2008, Docket no. 267-7 at ¶2. However, Mr. Fowler's investigation can be called
 12 cursory at best, and was in no fashion "reasonable" or "competent" based on the evidence
 13 submitted in his declaration. Where is the pre-filing memorandum? Where is the pre-filing legal
 14 research? Where is the pre-filing analysis of law applied to fact? Why is there not even a single
 15 pre-filing email setting forth any evidence? The after-the-fact "rationalization" is obvious.

16 Mr. Fowler confirms this in his testimony; he simply testifies through his conclusory
 17 statements which are not based on any truly applicable factual investigation or legal analysis;
 18 rather he just generally alludes to "interviews of Romi Mayder's supervisors at Verigy regarding
 19 Romi's statements to them regarding his plan to go into a *real estate business* with his older
 20 brother, Wesley" [emphasis added.], *Id.* at ¶3; to a "review of documents obtained from the
 21 California Secretary of State and the Internet regarding the two STS businesses as well as Wesley
 22 Mayder's businesses, which show the same street address for STS, Inc. and Wesley Mayder's
 23 businesses, *Id.*; and to an "interview of Robert Pochowski and review of documents produced by

24 ⁷ Verigy states, "Here, as shown below, Wes Mayder was an active co-conspirator in *his*
 25 *brother's activities*, regardless of his formal position in the STS Entities. And, as his brother's
 26 co-conspirator, Wes Mayder *is equally liable for Romi Mayder's misconduct.*" Opp. at 4
 27 (emphasis added.) The only problem is that Verigy neglected to adduce *any evidence* in its
 28 opposition of any Romi Mayder misconduct, and certainly has made no request for judicial
 notice that would legitimize the Court's looking beyond the papers filed on this motion. It is
 not enough that some helpful facts may exist somewhere in the Court's record; it is the
 obligation of the opposing party to cite to specific evidence showing triable facts. *Amnesty*
America v. Town of West Hartford, 288 F.3d 467, 470 (2nd Cir. 2002); *Katherine G. ex rel.*
Cynthia G. v. Kentfield School Dist., 261 F.Supp.2d 1159, 1167 (N.D. Cal. 2003).

1 him indicating Wesley Mayder's active participation in STS, LLC." *Id.* Mr. Fowler puts forth
 2 these activities as his "investigation" which led him to conclude that "there was a basis in fact for
 3 the allegations regarding Wesley Mayder's liability in the complaint." *Id.* However, they
 4 demonstrate nothing more than a cursory review based on incautious, fallacious and paralogical
 5 reasoning. And, why was it that Mr. Fowler and the Bergeson firm—after getting not one but two
 6 Rule 11 notifications—failed to come forward with any of this supposed "evidence" within the 21
 7 days?

8 The first two prongs of Mr. Fowler's "investigation" reveal precisely nothing as to Wesley
 9 Mayder's culpability or likely culpability for claims for trade secret misappropriation, breach of
 10 contract, computer abuse, privacy breach or other claims—absolutely nothing. What does the
 11 fact that Wes Mayder is a licensed real estate broker with a (currently inactive) real estate practice
 12 have to do with any of this? *The answer is nothing* other than a profoundly spurious leap of logic
 13 on Mr. Fowler's part: if Romi Mayer told his supervisors he was thinking of going into a real
 14 estate business with his older brother Wesley, it does not follow necessarily, as Mr. Fowler seems
 15 to have concluded, that any business that Romi Mayder went into was with his older brother
 16 Wesley, nor that any business Romi Mayder went into involved his older brother Wesley on the
 17 footing of a founder, director, officer, employee or relationship other than what is true and has
 18 been shown to be true, that Wesley was a passive, minority shareholder.

19 Likewise, Mr. Fowler went on the Internet and reviewed corporate documents and
 20 observed the same street address for the brothers' separate businesses. His line of reasoning, that
 21 if two businesses have the same street address, ergo, the two businesses have the same ownership,
 22 fails necessarily for logical reasons as well as recognizable building tenancy patterns. According
 23 to the Internet, Mr. Fowler's firm, Bergeson, LLP, shares the same street address, 303 Almaden,
 24 Blvd., San Jose, California, with Wachovia Securities, Prudential Securities Incorporated,
 25 Rockefeller Group Business Centers, and Café Primavera. Is it to be necessarily concluded that Mr.
 26 Fowler's firm is owned and operated by and employs the same people as one or more or even
 27 every other tenant at this address? (In fact, Fowler and the Bergeson firm before launching this
 28 very expensive litigation against Wes Mayder did not even bother to see that Wes Mayder's

WeDIRECT, INC. business is on the seventh floor of a third-party-owned commercial high-rise office building in San Jose and Romi Mayder's STS is located in separate offices on the third floor of that building. Just walking into the lobby of that building (at 3031 Tisch Way, San Jose) would have revealed that—less than 30 minutes of “factual research” had he done it even considering the less than 15 minute commute time from his 303 Almaden building in San Jose.

Additionally, Mr. Fowler failed to approach his interview with Romi Mayder's disgruntled ex-partner, Mr. Pochowski, with any necessary measure of objectivity, and believed implicitly Mr. Pochowski's statements as to “Wesley Mayer's active participation” in *one* of Romi Mayder's businesses, the limited liability company that was abandoned (and for which there was not a fully executed LLC Operating Agreement as Pochowski himself had refused to sign as had each of the spouses of the proposed members), and from that inferred (again) incorrectly and unnecessarily a degree of involvement by Wesley Mayder in Romi Mayder's business, Silicon Test Systems, Inc. See, Declaration of Daniel E. Hanley, submitted herewith, at ¶¶4-8.

Further, Mr. Pochowski's declaration reveals that he was privy to no conversations and has no evidence that Mr. Wes Mayder had any part in any alleged wrongdoing by either his brother or his businesses. Mr. Fowler's conclusory statement about his interview with Mr. Pochowski and “examination of documents presented by Mr. Pochowski” is completely unsupported by any documentary evidence: Mr. Fowler had an obligation to present to the Court competent evidence which would allow the Court to make an informed judgment as to the evidence considered and line of reasoning followed by Mr. Fowler, an obligation which he utterly fails to meet. Indeed, a fair “read” of what Mr. Fowler asserts is that he did less than 15 minutes worth of “research” and decided that a completely (and legally presumed innocent) minority shareholder of a Sub-S corporation could and should be held liable on each and every one of the supposed twelve different “causes of action” in this case.

Indeed, the most frivolous statement in Verigy's opposition, “Wesley Mayder's signature on the document [the LLC operating agreement] evidences *factually* the brothers' conspiracy to operate a company engaged in the semiconductor device testing industry—using Verigy's technology” (Opp. at 6:9-11, emphasis in original) is evidence of just how far Verigy is willing to

1 falsely and preposterously press its conclusory assumptions before the Court as so-called “factual
 2 evidence” of wrongdoing: Wesley Mayder’s having signed an operating agreement in no way
 3 evidences any knowledge or improper action on his part. Wesley Mayder never had, nor does
 4 Verigy present any evidence that he ever had, possession of any Verigy trade secrets, or
 5 knowledge of wrongdoing in signing the document. Such conclusory statements as those
 6 presented by Verigy’s counsel in purported “defense” of naming Wesley Mayder as a party to its
 7 Complaint, backed up by this invalid line of reasoning, is exactly the unprofessional conduct that
 8 Rule 11 is meant curtail and which Rule 11 authorizes this Court to sanction: completely
 9 assumptive leaps in logic with no factual relationships, presented to the Court as though there were
 10 indeed such factual relationships between what Mr. Romi Mayder did or where STS, Inc. was
 11 located, for example, and wrongdoing or liability on Mr. Wes Mayder’s part. Put bluntly, if
 12 Fowler (and Bergeson’s) conduct is allowed then every lawsuit against every small private
 13 corporation will allow every shareholder to be named as a co-defendant which is precisely the
 14 opposite of the settled strong policy under California law that shareholders are not liable for the
 15 torts of others. See Cal. Civil Code, section 14; *Erkenbrecher v. Grant*, 187 C. 7, 9 (Cal. 1921);
 16 *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service*, 217 C. 124, 129 (Cal. 1932).
 17 The same is true for LLC members. Cal. Corp. Code, sections 17101, 17150.

18 Further, Mr. Fowler also testifies that he based his recommendation to name Wesley Mayder
 19 on “my knowledge of existing law as well as my experience litigating questions of conspiracy, joint
 20 venture liability, partner liability, vicarious liability and *alter ego* liability for over four decades.”
 21 Fowler Decl. ¶ 5. It is significant, however, that none of these allegations for liability found their
 22 way into the Complaint, none are supported by any evidence whatsoever and, just as it is significant
 23 that Verigy now chooses to argue a civil conspiracy claim against Wesley Mayder which it also
 24 failed to properly plead. Verigy argues “Wes Mayder was an active co-conspirator with his brother
 25 Romi Mayder. And there was certainly reason to believe this before the Complaint was filed.” Opp.
 26 14:5-7. Fowler Decl., ¶¶2-6. If this were so, then why did Verigy fail to plead the necessary facts
 27 supporting a civil conspiracy claim in its Complaint against Wesley Mayder?

28 Federal Courts have held that experienced lawyers will be held to higher standards than

1 inexperienced ones, and their conduct scrutinized in light of their experience. *Huettig & Schromm,*
 2 *Inc. v. Landscape Contractors Council of Northern Calif.*, 790 F.2d 1421, 1426 (9th Cir. 1986). The
 3 Court should consider that if an experienced lawyer such as Mr. Fowler truly thought Verigy had a
 4 valid claim for civil conspiracy against Wesley Mayder, which it does not, or that Wesley Mayder
 5 was liable under any of joint venture, partner, vicarious or *alter ego* theories, Mr. Fowler would have
 6 properly seen that such was alleged in the Complaint at the time it was entered a year ago. Verigy's
 7 attempt to plead this claim (insufficiently) now should be recognized for the equivocation that it is,
 8 and sanctions should be issued against Verigy and its counsel.

9 **III. VERIGY'S SANCTIONABLE CONDUCT SHOULD BE**
 10 **WEIGHED IN LIGHT OF ITS REPEATED REFUSAL TO**
 11 **WITHDRAW CLAIMS AGAINST WESLEY MAYDER AND**
 12 **ITS CONTINUING TO REARGUE THE SAME TO THE COURT.**

13 Verigy attempts to evade responsibility for undertaking these frivolous claims against Wesley
 14 Mayder by asserting that the claims filed in the Complaint were reasonable based upon the
 15 investigation conducted by Verigy's attorneys at the time they were filed. Opp. at 21- 22. However,
 16 while it is true that reasonableness is measured at the time the motion or paper is presented to the
 17 Court, if matters contained in the motion or paper are also later presented or advocated to the court,
 18 reasonableness will be measured at that later time, notwithstanding that no new paper is filed. Fed.
 19 R. Civ. Proc., Rule 11(b); *Jones v. International Riding Helmets*, 49 F.3d 692, 695 (11th Cir. 1995).

20 Hence, while Verigy argues, wrongly, that its investigation and legal conclusions over a year
 21 ago were reasonable under the circumstances, it completely fails to support its claims in light of the
 22 fact that (a) it has refused to withdraw its baseless claims for close to a year, despite multiple
 23 warnings from Mr. Mayder's counsel; (b) it failed to provide any substantive response during the
 24 Rule 11 twenty-one (21) day cooling off period, (c) indeed, failed to provide any such substantive
 25 response during the two Rule 11 twenty-one (21) day cooling off periods (over 50 days of prior
 26 notice before this motion was filed) and (d) it has since reargued these matters to the Court, not least
 27 in a joint letter with defendants dated June 19, 2008 in which, in opposition to defendants' assertion
 28 that "Verigy has brought a long list of claims against defendant Wesley Mayder in a twenty-page
 complaint that is almost completely devoid of any factual allegations against him," Verigy continues
 to reargue these unfounded claims against Wesley Mayder, alleging, "...[T]here is ample evidence

1 that Verigy will submit in opposition the [sic] Wesley Mayder's motions showing his active
 2 participation in both defendant companies." See Joint Letter to Judge Whyte, June 19, 2008, Docket
 3 no. 246 at p. 2. In support of this argument, Verigy states,

4 ...[A]lthough Verigy has not yet filed its opposition, Verigy will submit ample
 5 evidence showing that Wesley Mayder was anything but a passive investor.
 6 Indeed, there is no dispute that Wesley Mayder was involved in STS, LLC
 7 [defendant Silicon Test Solutions, LLC] from September-December 2006
 8 [Citation omitted], that Wesley Mayder directed his employee to create an modify
 9 STS, Inc.'s website [Citation omitted], that Wesley Mayder obtained a "witness"
 10 to backdate Romi Mayder's inventor notebook [Citations omitted], or that Wesley
 11 Mayder negotiated for office space in his building for STS, inc. [Citation
 12 omitted]. Indeed, STS, LLC's own attorney admitted in 2005 that Wesley
 13 Mayder was one of the founding members and co-owner of STS, LLC [Citation
 14 omitted]. This additional evidence leaves no doubt that at the very least, Mr.
 15 Wesley Mayder was a founder of the defendant companies.

16 *Id.* at p. 3. Even if Verigy's investigation at the time of filing its Complaint were reasonable, which it
 17 was not, it has had over a year in which to conduct a further investigation to substantiate its claims,
 18 during which time

- 19 (a) Mr. Mayder's counsel sent *three* letters to Verigy explaining Wesley Mayder's non-
 20 culpability and requesting that it dismiss Mr. Mayder from the lawsuit, which Verigy
 21 refused to do;
- 22 (b) Despite these multiple warnings, Verigy failed to serve documents requests and take
 23 Wesley Mayder's deposition until *after* the filing of these motions, and
- 24 (c) All the while Verigy continued to represent to the Court that Wesley Mayder was to a
 25 party to be held liable for its claims.

26 Hence, Verigy's oblique argument that the reasonableness of its conduct should be adjudged based
 27 upon its knowledge and belief at the time it filed the Complaint, and Mr. Fowler's supposed
 28 conclusions made based on evidence available almost a year ago, is contrary to established law as
 well as contrary to the facts in this case. "Counsel can no longer avoid the sting of Rule 11 sanctions
 by operating under the guise of a pure heart and an empty head." *Smith v. Ricks*, 31 F.3d 1478, 1488
 (9th Cir. 1994). Verigy had an obligation to investigate the factual and legal basis for its claims
 against Wesley Mayder, and, finding none, to dismiss them. "The purpose of Rule 11 is to deter
 dilatory or abusive pretrial tactics and to streamline litigation by excluding baseless filings.
 [Citation.] When it becomes apparent that a case lacks evidentiary support, a client and his lawyer
 have a duty to withdraw their complaint." *Byrnes v. Lockheed-Martin, Inc.*, 2005 U.S. Dist. LEXIS
 39060, at *23 (N.D. Cal. Dec. 28, 2005). Verigy and its counsel should be held liable for positions

1 and arguments it has taken before this Court consistently and recently, and its refusal to withdraw it
 2 claims, and its insistence on maintaining Mr. Mayder as a party to this lawsuit for almost a year
 3 despite three warning and without conducting any reasonable investigation or discovery should be
 4 taken into account.

5 **IV. REIMBURSEMENT OF WESLEY MAYDER'S LEGAL**
 6 **FEES AND COSTS IS WARRANTED AS SANCTIONS.**

7 If the Rule 11 certification is violated, the Court is to impose an appropriate sanction upon the
 8 attorneys or parties who have violated or are responsible for the violation. Fed. R. Civ. Proc., rule 11
 9 (c)(1). The court is authorized to impose a sufficient sanction, to "what suffices to deter repetition of
 10 the conduct or comparable conduct by others similarly situated." *Id.* at (c)(4). A sanction is
 11 appropriate when it is "the *minimum* that will serve to adequately deter the undesirable behavior."
 12 *Doering v. Union County Bd. of Close Freeholders*, 857 F.2d 191, 194 (3rd Cir. 1988)[emphasis in
 13 original].

14 An award of monetary sanctions is fully in line with this stated purpose of deterrence: the
 15 Court in *Byrnes v. Lockheed-Martin*, in issuing rule 11 sanctions against a plaintiff, awarded
 16 defendants monetary sanctions to "partially reimburse them for fees incurred," and also in an amount
 17 "to deter similar future conduct." *Byrnes v. Lockheed-Martin, Inc.*, 2005 U.S. Dist. LEXIS at *26.
 18 Certainly in a case as egregious as this one, where, despite having and presenting absolutely no
 19 factual evidence of any wrongdoing on the part of Wesley Mayder, Verigy insists on maintaining its
 20 wrongful claims against him, monetary sanctions reimbursing Mr. Mayder for fees incurred
 21 defending himself against this wrongful suit are appropriate. It is just plain that Verigy and its
 22 counsel elected to pursue Wes Mayder not because of any facts, any law, or any evidence; but, rather,
 23 they chose to do so (and still seek to do so) as a way to pressure and punish Wes Mayder.

24 **V. VERIGY'S REQUEST FOR ITS FEES AND COSTS IS MERITLESS.**

25 Can a further Rule 11 violation occur as a result of a preposterous position taken by Rule
 26 11 "respondents" who failed to ever provide any substantive responses during not one but two
 27 Rule 11 "cooling off" periods? If so, this would be precisely the case for so finding because,
 28 oddly, after almost as much as admitting that there was a Rule 11 violation by Verigy and by its
 attorneys in naming Wes Mayder without doing any genuine prior research, Verigy (and its law

1 firm) then turn around and, as part of its defense against these Motions, Verigy asks for sanctions
 2 against Wesley Mayder in the form of reimbursement for its legal fees and costs in defending
 3 against his Motion for Sanctions under Rule 11! What? Is this really honest advocacy? If so, why
 4 none of it weeks and months ago when the first (and then second) Rule 11 notifications were sent?

5 The truth, as has been shown above, not only is Wesley Mayder's motion far from
 6 meritless or baseless, but was brought for the proper purpose of achieving the dismissal of a
 7 collateral victim of a lawsuit where numerous other attempts had failed. Not only does Verigy
 8 fail to meet the objective standard in defense of its complaint as originally filed, but it utterly fails
 9 to present any evidence of wrongdoing on Wesley Mayder's part for its "new" claim of civil
 10 conspiracy. Verigy's request for sanctions is as meritless as its claims against Wesley Mayder—
 11 and the Court would be entirely within its rights in noting that it is a further Rule 11 violation and
 12 certainly lacking in professionalism to assert now a position that was never before asserted and
 13 that obviously is so procedurally wrong as to not merit any further discussion.

14 CONCLUSION

15 For the foregoing reasons, Wesley Mayder's motion for sanctions pursuant to Federal Rule
 16 of Civil Procedure, Rule 11 should be granted, Wes Mayder should be dismissed from this action,
 17 fees and costs should be awarded against Verigy and against its counsel, and Verigy's request for
 18 attorneys' fees and costs should be denied and plaintiff and its counsel should be further reminded
 19 of their Rule 11 obligations as they pertain to further activities in this litigation.

20 Respectfully submitted,

21 Dated: July 25, 2008

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